TESTIMONY BEFORE CONGRESSIONAL
SUBCOMMITTEE ON FEDERALISM AND THE CENSUS
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BY
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TO THE HONORABLE MEMBERS OF THE HOUSE GOVERNMENT REFORM SUBCOMMITTEE ON FEDERALISM AND THE CENSUS:

It is my pleasure to address the Honorable Members of the Subcommittee on Federalism and the Census and in particular, I am pleased and privileged that you have extended an invitation to me to talk about brownfields here in the Commonwealth of Pennsylvania. My company, Brownfield Realty, Ltd., handled the first brownfield transaction under Pennsylvania's then-new voluntary cleanup program (VCP), the Land Recycling Act, known colloquially as Act 2. Pennsylvania's VCP or Brownfield law, has provided a tremendous boost to the Pennsylvania economy by allowing a common sense approach to the handling of environmentally challenged properties.

That first site, the Delta Truck Body site (see Exhibit A to these remarks) had been on the list maintained by the Pennsylvania Hazardous Sites Cleanup Act (HSCA) for more than three years when we negotiated the first Consent Order and Agreement with Pennsylvania's Department of Environmental Protection (DEP). That Order which was dated October 31, 1995, was the first step in getting this property back into productive use and generating tax revenue and providing employment for the local community.

Since that first site, Pennsylvania's DEP has approved the cleanup reuse of hundreds of sites and now 10 years later, it is clear that the Pennsylvania VCP is not only an unqualified success but a model for other states to follow.

As noted in my article written for Business Law Today in May of 1997 (see Exhibit B) at the time of the Delta Truck Body transaction there was no federal law allowing for risk-based remediation. There was no federal VCP. Since that time Congress has passed legislation[1] which provides for no federal involvement (a process commonly called "overfiling") on a state brownfield site which is being remediated under a state brownfields program unless: a) a state requests EPA action; b) where the EPA

[1] On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act.

determines that continuing releases present an imminent and substantial endangerment to human health or the environment; c) or where certain new information regarding the extent of contamination is perceived by the EPA as requiring further remediation. Notably however, this law only limits EPA overfiling under CERCLA, the federal Superfund law, while the EPA is free to pursue claims and enforcement under other federal environmental laws such as RCRA, TSCA and the like. Fortunately, in April of 2004, Pennsylvania and the EPA have executed a Memorandum of Understanding (MOU) which covers federal involvement where CERCLA, RCRA and TSCA legislation is implicated and clarifies how sites remediated under Act 2 may also satisfy requirements for these three (3) key federal environmental laws.

Since inception, Pennsylvania's Act 2 has allowed the cleanup and reuse of at least 1,712 sites.[2] In addition to the enviable record which Pennsylvania has behind it DEP has not rested on its laurels. The formation of the Brownfield Action Team, the Low-risk Sites Process and the Clean Fill Policy are outgrowths of the original VCP program. Together with PA SiteFinder which has listed 485 properties since its creation in 2001, DEP has awarded 50 Brownfield Inventory Grants. These grants together with the grants and low interest loans under the Industrial Sites Reuse Program have all contributed to making Pennsylvania an extremely hospitable venue for new and existing businesses.

It is also important to mention the use of environmental insurance products such as stop-loss coverage, environmental impairment liability protection and cap cost policies which have allowed questionable transactions to proceed with the assurance that financial resources will be available in the event unexpected contamination is found at a later date or if remediation costs exceed preliminary estimates. These policies together with the Pennsylvania brownfield initiative, have permitted transactions to proceed in situations where uncertainty and speculation abounded regarding a particular site.

It should also be noted that Act 3 which was adopted as part of the Pa. VCP legislation in 1995, also provides significant protection for economic development agencies, lenders and fiduciaries in the event they should come into the chain of title of brownfield properties or are suddenly faced with overseeing the maintenance of such sites. Act 3, the Economic Development Agency, Fiduciary and Lender Environmental Liability Act, provides a tremendous amount of comfort to innumerable financial institutions, economic development agencies, trustees and other key stakeholders who fear that state environmental laws might be used to force liability upon them.

This legislation provides that in the case of economic development agencies they will incur no liability unless the authority or agency directly causes an immediate release, or directly exacerbates a release of a regulated substance on or from the property—a reasonable threshold to be sure. Similarly, lenders will not be tagged with liability if they are engaged in the routine practice of commercial lending and: (1) the lender does not

[2] As per the FY 2003-2004 Annual Report issued by DEP dated 3/2005, the last date for which figures are available.

directly cause an immediate release or directly exacerbate a release of a regulated substance on or from the property; and (2) the lender does not knowingly and willfully compel a borrower to (i) do an action which causes an immediate release of a regulated substance; or (ii) violate an environmental act. Moreover, if there is liability, it is limited to the cost of the response action directly attributable to the lender's activities and only if the lender's actions were the proximate and efficient cause of the release or violation. A key point to remember is that there will be no liability just because the lender has decided to foreclose nor will liability arise for any release which occurs prior to foreclosure even if it continues after the foreclosure. Any release discovered in the course of performing due diligence is presumed to be a prior or continuing release.

Finally for trustees and other fiduciaries there will be no liability if during the time the fiduciary actively provided services a release occurred; the fiduciary had the express power and authority to control property which was the cause of or the site of such release as part of those actively provided services; **and** the release was caused by an act or omission which constituted gross negligence or willful misconduct. Similar to the protection extended to lenders, any liability is limited to the cost of the response action directly attributable to the fiduciary's activities. Also, there will be no liability for any release which occurs prior to the active provision of services by the fiduciary and any release discovered in the course of performing due diligence is **presumed** to be a prior or continuing release.

These protections afforded to economic development agencies, lenders and fiduciaries all add up to providing key relief to an area which was frought with danger. To that end, I believe Act 3 has been an unqualified success in providing the comfort required by these third parties in order to maintain reasonable control over their respective situations where uncertainty and fear had previously reigned.

If there is one “bug-a-boo” in the system it is the increasingly popular policy of state environmental agencies seeking compensation for natural resource damages (NRD). While Pennsylvania has taken a common sense approach and not proceeded to follow this path, our sister state, New Jersey, has embarked upon an aggressive campaign to obtain financial recompense from “responsible parties” for the overall damage done to the state’s natural resources as a result of migrating pollution. While the policy has surface appeal if you take the argument to its logical conclusion each one of us could and should be prosecuted for driving vehicles which contribute to the deteriorating condition of the air we breathe and the question becomes where does it end? In my humble opinion, while the states are free to govern their own affairs the U.S. Congress could require, by statute or regulation, that any existing or future MOU’s with states require a prohibition on the recovery of NRDs except in the case of willful, malicious or intentional acts. This would be a significant step in stemming the tide of this pernicious policy which has attracted the attention of other states as well.

Notwithstanding the controversy of NRD recovery, my opinion is that the Pennsylvania program consisting of Acts 2, 3 & 4 of the 1995 legislative session, has been one of the finest legislative products produced by the Commonwealth and the fact

that we are holding these hearings in the city containing this country's largest brownfield site, serves as further testimony as to the viability and vitality of the Pennsylvania program and the cooperation between the Commonwealth and the federal government.

Thank you extending the invitation to speak before your Subcommittee and thank you for offering me the opportunity to share my views with the Members of the Subcommittee. I look forward to any questions you may concerning my testimony.